A

HONG LEONG BANK BHD

v.

MERCES BUILDERS SDN BHD & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[SUIT NO: D8-22-380-2005]
20 MARCH 2007

C ***CIVIL PROCEDURE:*** *Summary judgment - Appeal against - Hire purchase agreements - Default of - Whether hire purchase agreement superceded by a restructuring agreement entered into between plaintiff and first defendant - Whether plaintiff's claim against defendants maintained - Whether defendants jointly and severally liable to pay plaintiff the* D *guaranteed sums - Whether there was triable issue in plaintiff's claim*

This was an appeal by the defendants against the decision of the senior assistant registrar in allowing the plaintiff's application for summary judgment under O. 14 of the Rules of the High Court 1980. The claim arose from five hire purchase agreements granted E by Hong Leong Finance Berhad which was subsequently assigned to Hong Leong Bank Berhad (the plaintiff herein). The second to fifth defendants were personal guarantors of the first defendant in respect of the performance of the first defendant in discharging the F first defendant's obligation under the five hire purchase agreements. The first defendant had defaulted in the repayment of the monthly hire purchase sums. Consequently the plaintiff and the first defendant entered into a restructuring agreement by a letter dated 3 June 2003. The grounds relied upon by the first G defendant were, *inter alia*, (a) the hire purchase agreement had been superceded by the restructuring agreement; (b) the first defendant had complied with this requirement by executing the consent judgment as agreed in favour of the plaintiff; (c) that the defendants had already secured the undertaking from the Nikmat H Bidara Sdn Bhd to assign to the plaintiff 20% of the progress payment which it would be receiving from Sarawak Housing and Development Commission; (d) the letters produced showed the commitment on the part of the first defendant to fulfill their obligations under the restructuring agreement. The plaintiff, I however, argued that, *inter alia*, (a) the restructuring letter had not superceded the hire purchase agreement; (2) contrary to the first defendant's submission the third party which was Nikmat Bidara

Sdn Bhd had not provided the necessary undertaking to assign at least 20% of the progress payment receivable from Sarawak Housing and Development Commission directly to the plaintiff; (3) from the plaintiff's records, no such undertaking was forthcoming from Nikmat Bidara.

Held (dismissing the appeal):

(1) The plaintiff's letter dated 3 June 2003 which the defendants chose to call 'restructuring agreement' was clearly not a novation agreement to substitute parties' application under the five hire purchase agreements entered into between the plaintiff and the defendants. Neither was it a novation agreement to substitute the obligations of the plaintiff and the guarantors. It was purely an offer by the plaintiff to settle the arrears of repayment under the five hire purchase agreements. The letter clearly retained the right of the plaintiff to maintain its claim under the five hire purchase agreements against the first defendant company and the second to fifth defendant guarantors. (paras 10 & 11)

(2) The first defendant had only complied by entering into the consent judgment in respect of the claim by Hong Leong Bank and partly complied with making some payments to Hong Leong Bank Berhad. The obligation to settle the arrears of payment under the five hire purchase agreements had remained undisturbed and the plaintiff was entitled to make a claim against the first defendant. In the event the first defendant was liable to pay the plaintiff the arrears of repayment under the five hire purchase agreements. The obligations of the second to fifth guarantors were co-extensive with the obligation of the first defendant. They were therefore jointly and severally liable to pay the plaintiff the sums that they have guaranteed. There was clearly no triable issue in the plaintiff's claim. (paras 14, 15, 16, 17, 18 & 19)

Case(s) referred to:

Credit Corporation (M) Bhd v. Bulan Sabit Sdn Bhd & Ors [1989] 1 CLJ 912; [1989] 1 CLJ (Rep) 444 HC ***(refd)***

For the plaintiff - CW Ling; M/s Ho, Loke & Koh
For the 1st defendant - Amir Asree; M/s Zainul Rijal Talha & Amir
For the 2nd & 4th defendants - HY Lee; M/s HY Lee & Sek
For the 5th defendant - HP Chua; M/s Onn & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Kang Hwee Gee J:

(Oral Judgment Delivered Immediately After Submission)

[1] This is an appeal by the defendants against the decision of the senior assistant registrar in allowing the plaintiff's application for summary judgment under O. 14.

This Is My Oral Judgment: ***(Ex-tempore)***

[2] The claim arose from 5 Hire Purchase Agreements granted by Hong Leong Finance Berhad and which was subsequently assigned to Hong Leong Bank Berhad (the plaintiff in this case).

[3] The 2nd to the 5th defendants were personal guarantors of the 1st defendant in respect of the performance of the 1st defendant in discharging the 1st defendant's obligation under the 5 Hire Purchase Agreements.

[4] The 1st defendant had defaulted in the repayment of the monthly Hire Purchase sums. Consequently the plaintiff and the 1st defendant entered into a restructuring agreement by a letter dated 3 June 2003 which read as follows:

Your Ref : mhb-hlbb-041503

Our Ref : KLM/97/116

3 June 2003

MERCES BUILDERS SDN BHD
No. 48, Ground Floor.
Jalan 10/116B Kuchai Entrepreneurs
Park, Jalan Kuchai Lama
58200 Kuala Lumpur.

WITHOUT PREJUDICE
By Fax/Mail

Tel: 7982 6228
Fax: 7980 6670

Attn: Dato' Lee Hock Soon

Dear Sir,

HLBB – Overdraft Facility Of RM3,000,000.00
Overdue Trade Facilities Of RM124,000.00
HLFB - Industrial Hire Purchase Facilities Of RM1,500.000.00

We refer to your letter dated 6-1-2003 and our meeting on 21-5-2003.

After due deliberation, we are pleased to inform that HLBB and HLFB are agreeable on the followings:

1) To give consent on the subdivision of Kuching Lands;

2) To allow Nine (9) months period till 28-2-2004 for redemption of Kuching Lands at the sum of RM740,000.00;

3) To allow waiver for the sum of RM106,000.00 for IHP facilities with HLFB. However, this waiver will only be effected at the tail end when you make full settlement of the said facilities;

4) To accept RM3,000.00 per month commencing June 2003 till August 2003 and thereafter subject to review.

Please take note that the above arrangements are subject to:

a) You execute the Consent Judgement **by 10-6-2003** and to record the same in the Court hearing **on 16-6-2003** for the entire outstanding owing as claimed in the suit under KL High Court D4-22-2054-2002.

b) The Chargor of Kuching Lands, Nikmat Bidara Sdn Bhd, to provide undertaking **by 16-6-2003** to assign at least 20% of each of the progress payments receivable from Sarawak Housing & Development Commission, directly to us until full settlement of both HLBB and HLFB loan outstanding.

c) Repayments agreed upon are duly complied with failing which the arrangement is to be treated as null and void.

d) HLBB and HLFB reserve the right to terminate this agreement without notice and proceed with further legal actions in the event of non-compliance of any term herein.

The Letter of Consent for subdivision of Kuching Lands shall be forwarded to you upon compliance of Clause (a) and (b).

Save and except the variations set out in this letter, all terms and conditions in the Letter(s) of Offer, agreement(s) and/or any security documents in respect of the banking facilities and Industrial Hire Purchase Agreement(s) shall continue to be in full force and effect and nothing herein above shall prejudice our rights under the existing legal suit as stated above and the foreclosure proceedings.

Notwithstanding anything contained herein, we reserve the right to proceed with the civil and foreclosure proceedings unless all the terms of the proposed redemption and settlement have been complied with by you.

Kindly indicate your acceptance by signing and returning us the duplicate copy of this letter **within Seven [7] days** from the date hereof, failing which this offer will lapse and we shall continue with our recovery action.

Your urgent attention is highly appreciated.

Yours faithfully,

For Hong Leong Bank Berhad

Sgd.	Sgd.
T.J. Tan Manager Remedial Management Department	Lee Weng Swee Manager Remedial Management Department

c.c. HLB - Che Mokhtar & Ling
HLF-Ho, Loke & Co.

I/We hereby accept the terms and conditions as stated hereinabove.

Merces Builders Sdn. Bhd.

Sgd.

...

Authorised Signatories

Date : 9 Jun 2003

Company Stamp :

[5] The grounds relied upon by the 1st defendant are as follows: (verbatim)

1. The Hire Purchase Agreement had been superceded by the restructuring agreement as evidenced by the letter exh. "LHS1". Paragraph a, b, c and d of the letter clearly states the 1st defendant was obliged to execute a consent judgment in favour of the plaintiff in respect of a suit at the KL High Court D4-22-2054-2002 for this restructuring agreement to be effective.

2. The 1st defendant has complied with this requirement by executing the consent judgment on 16 June 2003.

3. We had also complied with para. b of the agreement whereby we had already secured the undertaking from Nikmat Bidara Sdn Bhd to assign to the plaintiff 20% of the progress payment which it would be receiving from Sarawak Housing and Development Commission. We do not have the letter in our possession to prove that Nikmat Bidara had provided the undertaking to the plaintiff but we have a letter written by the plaintiff to the Land Office informing the Land Office that the plaintiff had no objection to the subdivision of the land submitted by Nikmat Bidara which proves that the undertaking must have been given as otherwise the plaintiff would not have issued such letter.

4. By another letter exh. "LHS3" plaintiff had reconfirmed it accepted the proposal whereby the plaintiff was prepared to accept the terms pertaining to the commencement of the progress payment upon the commencement of the development project.

5. By a letter dated 14 October 2004 exh. "LHS4" the 1st defendant issued a letter to the plaintiff informing that the proposed development of Nikmat Bidara land was still on-going but there was a change in the government planning policy with respect to density of the area and also by this letter informed the plaintiff that the 1st defendant proposed to submit the planning brief to the authority to accommodate the new development density. In this letter also the 1st defendant seek the plaintiff consideration for extension of time facility to commence the project.

6. The letters produced show the commitment on the part of 1st defendant to fulfil their obligation under the restructuring agreement.

(The counsel for the 2nd and 4th defendants had nothing to add – will adopt what is submitted by counsel for the 1st defendant.

Counsel for the 5th defendant is not present but 1st defendant counsel says he (5th defendant) would adopt his submission.)

[6] Reply by counsel for the plaintiff: (verbatim)

1. Basically our claim is based on the breach of the 5 Hire Purchase Agreements which were guaranteed by the 2nd to the 5th defendants.

2. The restructuring letter dated 3 June 2003 had not superceded the hire purchase agreement. The validity of the hire purchase agreement and the guarantee are well preserved at p. 2 of the restructuring letter which read as follows:

> Save and except the variations set out in this letter, all terms and conditions in the Letter(s) of Offer, agreement(s) and/or any security documents in respect of the banking facilities and Industrial Hire Purchase Agreement(s) shall continue to be in full force and effect and nothing herein above shall prejudice our rights under the existing legal suit as stated above and the foreclosure proceedings.
>
> Notwithstanding anything contained herein, we reserve the right to proceed with the civil and foreclosure proceedings unless all the terms of the proposed redemption and settlement have been complied with by you.

3. The restructuring agreement was subject to certain conditions being fulfilled by the 1st defendant as well as third party Nikmat Bidara Sdn Bhd.

4. Contrary to 1st defendant's submission the 3rd party which is Nikmat Bidara Sdn Bhd has not provided the necessary undertaking by 16 June 2003 to assign at least 20% of the progress payment receivable from Sarawak Housing and Development Commission directly to the plaintiff.

5. The issuance of the letter of consent for subdivision by the plaintiff to the Land Office in Sarawak does not mean that Nikmat Bidara had provided the undertaking as explained by the deponent of the plaintiff's affidavit. The said letter of consent was issued by the plaintiff from his own record to facilitate the carrying on of the project on the land which was charged to the plaintiff which Nikmat Bidara was supposed to develop.

6. From our record no such undertaking was forthcoming until today from Nikmat Bidara.

7. The other condition requiring the 1st defendant to pay commencing from June 2003 the sum of RM6,000 to the 1st defendant's overdraft account in order that the sum of RM3,000 is utilised to pay the 1st defendant's overdraft account and the remaining RM3,000 to pay the overdue hire purchase instalment. Our record shows that the 1st defendant only made 3 such payments.

8. The letter dated 29 March 2003 actually refers to the overdraft and trade facilities granted by Hong Leong Bank Berhad which is irrelevant.

[7] Reply by counsel for the 2nd and 4th defendants: (verbatim)

1. The restructuring agreement dated 3 June 2003 was a settlement between the 1st defendant and Hong Leong Bank and Hong Leong Finance. The letter dated 29 March 2003 was therefore not irrelevant as it is connected to the restructuring agreement. This can also be seen in para. b of the restructuring agreement dated 3 June 2003 which states clearly that the payment receivable from Sarawak Housing and Development Commission will have to be paid to Hong Leong Bank and Hong Leong Finance for the purpose of loan financing.

2. The mode of payment for these two accounts Hong Leong Bank and Hong Leong Finance that is to say the substantial payment would be coming from the progress payment from the said housing project in Sarawak. Therefore the payment of RM3,000 per month to Hong Leong Finance is but an ancillary payment to the whole restructuring agreement wherein as mentioned the substantial payment to be payable to the housing project.

3. The restructuring agreement must be read together with the original agreement because:

   a) The plaintiff has admitted the existence of such an agreement;

   b) The plaintiff also pleaded para. 26 of the statement of claim that the 1st defendant had failed to comply with the restructuring agreement.

   It follows therefore the cause of action against the 1st defendant only arises when the 1st defendant is in breach of the restructuring agreement and the plaintiff terminates it.

   Submits: The plaintiff's statement of claim is defective as para. 26 of the statement of claim did not state the material facts of the restructuring agreement dated 3 June 2003. Moreover the plaintiff fails to particularise the facts of the restructuring agreement namely the terms of the restructuring agreement.

Further the plaintiff did not even exhibit the restructuring agreement in the affidavit in supporting their application under O. 14.

We further submit that the 1st defendant was not in breach of the restructuring agreement. This is because the 1st defendant complies with the restructuring agreement namely by entering a consent judgment dated 16 June 2003 and the 1st defendant also fulfils the para. b of the restructuring agreement. This is confirmed by the plaintiff when the plaintiff issued a letter of consent for subdivision as in accordance with the restructuring agreement. We would like to emphasise that the letter of consent which is issued by the plaintiff dated 30 June 2003 when only the 1st defendant complies with para. a and b of the restructuring agreement. Hence from the above it shows that the 1st defendant has complied with the restructuring agreement.

4. In respect of the RM3,000 monthly payment towards the restructuring agreement between Hong Leong Bank and Hong Leong Finance and this RM3,000 per month would be commencing from June 2003 till August 2003 and thereafter subject to review.

The plaintiff has alleged in respect of the RM3,000 per month as follows:

Plaintiff's allegation that we only paid 3 payments may not be correct. Further the plaintiff states that the 1st defendant made irregular payment. The accounts exhibited under "HLB1" shows that there is no payment by the 1st defendant. Based on this fact it cannot be said that the plaintiff has proof that the 1st defendant had failed to make the payment according to the restructuring agreement. Even though the 1st defendant's payment of RM3,000 is irregular that does not entitle the plaintiff to terminate the restructuring agreement. This is because the plaintiff knew and agreed that the substantial payment of the amount owing to Hong Leong Bank and Hong Leong Finance which is approximately 4.6 million ringgit would have to come from the proceeds of the housing project in Kuching as agreed in the restructuring agreement. The RM3,000 is not the main substance of the restructuring agreement.

Furthermore as to date there is no termination letter issued by the plaintiff in respect of the restructuring agreement. The plaintiff also failed to issue any letter of demand which is based on the restructuring agreement.

[8] Counsel for the 5th defendant now present says he adopts the submission of counsel for the 1st defendant and the 2nd and 4th defendants. He has the following submission to add:

1. The plaintiff did issue notice to repossess but did not proceed to repossess. Had it been repossessed then the guarantors would have to pay less.

   See *Credit Corporation (M) Bhd v. Bulan Sabit Sdn Bhd & Ors* [1989] 2 MLJ 127 per Shankar J at Held:

   > (3) The claim for the plaintiffs was not one for a liquidated demand. In this kind of claim the action is for unliquidated damages and O. 14 is wholly inappropriate. One cannot convert an unliquidated claim to a liquidated one merely by putting down some allegedly precise mathematical calculation. What is reasonable in any particular case is more than a matter of mathematics.
   >
   > (4) The long delay between the date of repossession and the date of sale did raise a triable issue as to whether the plaintiffs had been prudent in the measures they adopted for the disposal of the goods. They have a duty to mitigate and they must show that they did so.

   Submits: There is a duty to mitigate.

[9] Reply by counsel for the plaintiff:

1. The plaintiff did issue a notice to the 1st defendant requesting them to return the subject matter equipment to the plaintiff as required under cl. 9.1 of the 5 Hire Purchase Agreements. It is the plaintiff's contention that the defendants had agreed under cl. 9.1 as well as 9.2 of the Hire Purchase Agreements that the plaintiff has no obligation to mitigate. This is clearly provided in cl. 9.1 and 9.2.

A **Findings And Decision**

[10] The plaintiff's letter dated 3 June 2003 which the defendants chose to call "restructuring agreement" was clearly not a novation agreement to substitute the parties' application under the 5 Hire B Purchase Agreements entered into between the plaintiff and the defendants. Neither was it a novation agreement to substitute the obligations of the plaintiff and the guarantors.

[11] It was purely an offer by the plaintiff to settle the arrears of repayment under the 5 Hire Purchase Agreements. The 1st and C 2nd paragraphs of the second page of the letter clearly retains the right of the plaintiff to maintain its claim under the 5 Hire Purchase Agreements against the 1st defendant company and the 2nd to 5th defendant guarantors.

D **[12]** The obligation under the 5 Hire Purchase Agreements would only be discharged if the 1st defendant satisfies the following conditions proposed in the said letter:

1. The chargor of Kuching Land Nikmat Bidara executes an E undertaking by 16 June 2003 to assign at least 20% of each of the progress payment receivable from Sarawak Housing and Development Commission directly to the plaintiff until full settlement of both outstanding accounts owed to Hong Leong Bank and Hong Leong Finance.

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2. To pay RM3,000 per month to Hong Leong Bank Berhad in respect of the repayment of the outstanding hire purchase payments commencing from June 2003 till August 2003 and thereafter subject to review.

G

3. To execute the consent judgment for the sums owing to Hong Leong Bank Berhad under the overdraft and trade facilities (the subject of another suit under KL High Court No. D4-22-2054-2002).

H **[13]** Having considered the evidence and heard the submission of the parties it is clear that at most the 1st defendant had complied with condition 3 above by entering into the consent judgment in respect of the claim by Hong Leong Bank and partly complied with condition 2 by making some payments to Hong Leong Bank I Berhad.

[14] It follows therefore the obligation to settle the arrears of payment under the 5 Hire Purchase Agreements had remained undisturbed and the plaintiff was entitled to make a claim against the 1st defendant. The argument of the 5th defendant that there was a duty to mitigate the defendants' loss is untenable as in this case it is clear that the plaintiff did not repossess the machineries which were in the possession of the 1st defendant although it did issue a letter to the 1st defendant to surrender them.

[15] The fact that the plaintiff had issued a letter to the Land Office in Kuching confirming its consent as a chargee of the land to be developed into a housing estate does not necessarily mean that the required letter of undertaking had been given by Nikmat Bidara to the plaintiff.

[16] The 1st defendant would have to show some evidence that indeed the undertaking had been given which it had failed to do.

[17] In the event the 1st defendant is liable to pay the plaintiff the arrears of repayment under the 5 Hire Purchase Agreements.

[18] The obligations of the 2nd to 5th guarantors are co-extensive with the obligation of the 1st defendant. They are therefore jointly and severally liable to pay the plaintiff the sums that they have guaranteed.

[19] There is clearly no triable issue in the plaintiff's claim.

[20] The appeal against the decision of the senior assistant registrar is dismissed with costs.